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Appellate Mechanism in Investment Arbitration: Novis Inventis or Sophistication of Existing Mechanism?

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Abstract:

In the past two decades, investment treaty arbitration has faced multiple challenges and criticism, which caused critics toward its efficiency and actual workability. However, it is still the main and the preferable method of dispute resolution between States and investors. Arbitration under the International Centre for the Settlement of Investment Disputes (ICSID) or UNCITRAL (The United Nations Commission on International Trade Law) allows an investor to sue a host state before an ad hoc arbitral tribunal for violations of bilateral investment treaties (BITs) or trade and investment agreements (e.g., the North American Free Trade Agreement (NAFTA)). Investor-State Dispute Settlement (hereinafter the “ISDS”) has been criticized for the lack of an appellate mechanism and the inconsistency and unpredictability of specific arbitration awards that are rendered. These shortcomings have often been attributed to the lack of a unified approach to ISDS and the lack of exact involvement of non-disputing parties in the proceedings.

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I. INTRODUCTION

Moreover, scholars contend that the appellate mechanism is not the same as annulment or setting aside the award procedures. Legal scholarship estimates and shows that in modern world annulment decisions under the ICSID rules, or the possibility of setting-aside decisions with recourse to national courts under the UNCITRAL rules, cannot be regarded as sufficient systems to correct poor awards as their foundations are highly restricted.^{*} Nowadays, the global community discusses changes and

^{*} See, C. Tietje et al., *The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership*, (Reference

suggests innovative mechanisms and procedures to develop and simplify *pre-* and *post-* award processes. Possible reforms to ISDS and drafts offered by UNCITRAL Working Group III justifies scholars' arguments.[†] Thus, I have decided to shed light on these amendments' sense and look deeper into whether they will reflect positively or negatively on the development of ISDS mechanisms.

This Article aims to examine the necessity of appellate mechanism in investment treaty arbitration in the framework of legitimacy and complexity of the existing procedure. Part II briefly identifies the existing post-award process, including the final and binding nature of the awards, and annulment award procedures. Part III then explores the implementation and discussion of the initial draft presented by UNCITRAL Working Group III. The Article is both descriptive and normative in outlook. Upon thorough scrutiny, I came to the conclusion that there should be an appellate mechanism for investment treaty disputes for the reasons identified below.

First and foremost, an appeal mechanism would allow the parties to continue selecting the decision-makers at first instance while ensuring consistency and predictability in the system. Secondly, the appellate mechanism for investment treaty disputes could assure the broad attitude toward the legitimacy in investment treaty disputes. Furthermore, it would prevent an abuse of power of finality of arbitral awards by arbitrators who might potentially be exposed to bribery or other complex corruption schemes, thereby making it impossible to appeal to unlawful actions of arbitrator(s). Also, this body is essential to enhance coherence and consistency in the ISDS system by creating an appellate body able to review manifest errors in the interpretation and application of treaty law. I agree with the statement that such an appeal mechanism is expected to improve the quality and consistency of investment arbitration awards by moving towards a precedent-based system.

A. History and origins of investment treaty arbitration

It has often been said that tentative predictions can be approximated by analyzing the past with due care and attention.[‡] Foreign investment is a vital tool for economic development and global prosperity.[§] As the global economy expands during turbulent economic conditions, investors are becoming more sophisticated about planning investments and resolving disputes related to those investments.^{**} Thus the meaning and role of investment treaties lay a foundation to legal relationships between Investor and State, rights and obligations of the Parties, incentives and MFN clauses, reliable dispute settlement mechanism.

In the late 40th of the past century, when the investment practice became a popular word and kicked

MINBUZA-2014.78850) 112, p. 242 (2014).

[†] Note by the Secretariat on "Possible reform of investor-State dispute settlement (ISDS) Appellate mechanism" https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral_wp_-_appeal_14_december_.pdf (Accessed on January 2, 2022)

[‡] Kluwer Arbitration London Event, The Gary Born lecture *International Arbitration: Recent Developments*, YOUTUBE (Oct. 14, 2015), <https://www.youtube.com/watch?v=MLa9KZEF92o&list=PLTkVrnnV6E6qDlzpM97q7n76xHlzwS7Kc&index=3&t=2s> in Ylli Dautaj, *Between Backlash and the Re-Emerging "Calvo Doctrine": Investor State Dispute Settlement in an Era of Socialism, Protectionism, and Nationalism*, Vol. 41, No. 3 Northwestern Journal of International Law & Business 276 (2021).

[§] See K. Scott Gudgeon, *United States Bilateral Investment Treaties: Comments on Their Origin, Purposes, and General Treatment Standards*, 4 Int'l Tax & Bus. L. 105, 111 (1986).

^{**} Bernard Kishoiyian, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law*, 14 Nw. J. Int'l L. & Bus. 327, 329-33 (1994) (discussing the evolution of bilateral investment treaties)

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into high gear in the international community, States have decided that investment should be separate from politics.^{††} It led to the development of promulgated treaties to promote foreign investment and created stability in the investment environment. This movement began with Treaties of Friendship, Commerce and Navigation^{††}, but soon moved beyond this as these treaties were limited commitments that did not have a forum for resolving disputes.^{§§} States found that investment treaties could serve as an instrument to enhance asset protection that facilitates wealth-creating cross-border capital flows, bringing net gains for host states and foreign investors.

Although the treaties have included the dispute resolution clauses, arbitration was not as popular as nowadays.^{***} This lies in the fundamental principles of international law, where individuals could not be considered subjects of international law. Subsequently, access to international courts has been closed for individual investors. Rather, writes Ian Brownlie, investors were forced to lobby their home country to espouse a claim on their behalf at the International Court of Justice (the “ICJ”), which resulted in only episodic investment disputes.^{†††} Afterwards, two sufficient changes have been happened and impacted the whole law system in investment law. First, the treaties gave investors a direct cause of action against the State for damages.^{†††} Secondly, without the need for a separate contract with a dispute resolution mechanism, investment treaties gave investors a choice of neutral settings for resolving their grievances.^{§§§} Considerably, in 1960th investors were used to apply for the International Centre for Settlement of Investment Disputes (“ICSID”).

The main feature of investment treaties is that it provides a unique dispute resolution mechanism that investors can invoke to seek redress for treaty violations. The nature of this mechanism is to provide a

^{††} See Kenneth J. Vandewelde, *United States Investment Treaties: Policy and Practice*, 7-22 (1992) (describing the evolution of foreign policy from the use of military force to treaties of friendship, navigation, and commerce, and finally to bilateral investment treaties). Jeswald Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 Int'l Law. 655, 656-58 (1990) (discussing the evolution of bilateral commercial treaties, bilateral investment treaties, and treaties of friendship, commerce and navigation); Int'l Chamber of Commerce, *Bilateral Treaties for International Investment* 5-8 (1977) in Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 Fordham L. Rev. 1525 (2005).

^{††} *Ibid.* at p.1526. See also E.I. Nwogugu, *The Legal Problems of Foreign Investment in Developing Countries*, 119-22 (1965) (describing the historical shift from protecting investments to treaties of friendship, commerce and navigation).

^{§§} See, e.g., Gudgeon, *supra* note 8, at 108; see also David R. Adair, *Investors' Rights: The Evolutionary Process of Investment Treaties*, 6 Tulsa J. Comp. & Int'l L. 195, 196-98 (1999) (describing the evolution of treaties); David A. Gantz, *Potential Conflicts Between Investor Rights and Environmental Regulation Under NAFTA's Chapter II*, 33 Geo. Wash. Int'l L. Rev. 651, 719-20 (2001) [hereinafter Gantz, *Potential Conflicts*]; Todd S. Shenkin, *Trade-Related Investment Measures in Bilateral Investment Treaties and the GA TT: Moving Toward a Multilateral Investment Treaty*, 55 U. Pitt. L. Rev. 541, 570-76 (1994) (describing the United States' shift from treaties of friendship, commerce and navigation to BITs) in Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 Fordham L. Rev. 1526 (2005).

^{***} John Collier & Vaughn Lowe, *The Settlement of Disputes, in International Law*, 132-69 (1999)

^{†††} See Ian Brownlie, *Principles of Public International Law*, 677-90 (6th ed. 2003). Moreover, the statistics of successful claims is quite limited.

^{†††} Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 Fordham L. Rev. 1525 (2005).

^{§§§} Daniel M. Price, *Some Observations on Chapter Eleven of NAFTA*, 23 Hastings Int'l & Comp. L. Rev. 421, 427 (2000)

variety of options^{****} for investors to set up fair and equitable recovery of their breached rights under an agreement concluded. Thus, it could include a choice in favor of the State's national court or arbitration. Although the investment treaty arbitration is based on commercial arbitration tools that provide strong presumptions of confidentiality, dispute settlement could not be considered transparent. This means, unless one is a party (an investor or a Sovereign), there is minimal access to the pleadings and evidence. There is little opportunity for amici curiae participation, and often the decisions themselves are confidential and not made available to the public.^{††††}

B. Criticism toward the legitimacy of investment treaty arbitration

Legitimacy largely depends upon factors such as determinacy and coherence, which can, in turn, get predictability and reliability. Related concepts such as justice, fairness, accountability, representation, correct use of the procedure, and opportunities for review also impact conceptions of legitimacy. When these factors are absent, individuals, companies and governments cannot anticipate complying with the law and plan their conduct accordingly, thereby undermining legitimacy.^{††††} The importance and concept of legitimacy in investment treaty arbitration are significantly widened nowadays in the discourse of a 'legitimacy crisis in the field, which is caused by inconsistencies in arbitral jurisprudence and interpretations by arbitral tribunals of investment treaties that are said to limit governments' policy space disproportionately to the benefit of foreign investors.'^{§§§§}

1. Free open market and international economic law from the prism of liberal values

Globalization and collaboration between States worldwide have ushered in a new era of liberal values in trade and investment law while enforcing international economic law. I agree that the core philosophical features of the western capitalist worldview have been a broad conceptual understanding

^{****} Such as tribunals organized under ICSID, the International Chamber of Commerce ("ICC"), the Stockholm Chamber of Commerce ("SCC") and/or the United Nations Commission on International Trade Law ("UNCITRAL") Rules

^{††††} Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 Fordham L. Rev. 1525 (2005). (describing that the United States and Canada, in contrast to other countries, have also taken the rare step of incorporating transparency obligations into recent trade agreements and model investment treaties. For example, in *Methanex v. United States*, transcripts of the hearing on the merits available to the public. *Methanex v. United States*, Transcripts for Merits Hearing (2004), at <http://www.naftalaw.org>. In *Methanex* and *UPS*, third parties have been granted the right to file amici curiae briefs. *United Parcel Serv. v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 91 61-73 (2001), at <http://www.naftalaw.org>; *Methanex v. United States*, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae", 31- 53 (2001), at <http://www.naftalaw.org>)

^{††††} Charles H. Brower, II, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 VAND. J. TRANSNAT'L L. 37, 51 (2003); Thomas M. Franck, *The power of legitimacy among nations*, 52 (1990) (identifying "determinacy" and "coherence" as two of four indicators of rule legitimacy); Johanna Kalb, *Creating an ICSID Appellate Body*, 10 UCLAJ. INT'L L. & FOREIGN AFF. 179, 196-200 (2005) (arguing that inconsistent arbitration awards undermine international investment).

^{§§§§} See Charles N Brower, *A Crisis of Legitimacy* Nat'l L J B9 (7 October 2002); Charles N Brower, Charles H Brower, and Jeremy K Sharpe, *The Coming Crisis in the Global Adjudication System* (2003) 19 Arb Int'l 415; Charles H Brower, *Structure, Legitimacy, and NAFTA's Investment Chapter* (2003) 36 Vand J Transnatl L 37; Ari Afilalo, *Towards a Common Law of International Investment: How NAFTA Chapter 11 Panels Should Solve Their Legitimacy Crisis* (2004) 17 Georgetown Int'l Envir L Rev 51; Ari Afilalo, *Meaning, Ambiguity and Legitimacy: Judicial Reconstruction of NAFTA Chapter 11* (2005) 25 Nw J Int'l L & Bus 279, 282; Susan D Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions* (2005) 73 Fordham L Rev 1521, 1523; M Sornarajah, *A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration* in Karl P Sauvant (ed), *Appeals Mechanism in International Investment Disputes* (Oxford University Press 2008) 39-45; Charles N Brower and Stephan W Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?* (2009) 9 Chi J Int'l L 471.

of individual freedom, ease of doing business, and the protection of human rights.^{*****} Although the world integrities became more liberal and progressive, investment treaty arbitration is jeopardized by the complexity of processes and lack of “unifying legal framework in which legality can be equated with legitimacy, as is traditionally done by lawyers”^{†††††}.

Trade and investment are salient and dynamic fields in international economic law. Nevertheless, their connections have been under-explored and under-theorized.^{†††††} As stated by scholars^{§§§§§}:

Not all states (or, for that matter, adjudicators) share a preference for greater convergence, whether substantively or jurisprudentially. One can still locate a number of diverging elements between international trade and investment law: the original goal of investment arbitration is a proper (reasonable) settlement in a given dispute rather than any general law-making^{*****}; the nature of remedy in investment arbitration is retrospective (*ex tunc*), while the WTO remedy is only prospective (*ex nunc*) and there exists a fundamental public-private law distinction between these two legal systems.^{†††††}

2. Backlash in investment treaty arbitration

Legal scholars by making arguments believe that the main criticism is due to the lack of a uniformed approach for investment treaty dispute settlement, which asserts legal scholarship has been the main cause of the legitimacy crisis in investment treaty arbitration. First and foremost, different tribunals can come to different conclusions about the same standard in the same treaty.^{*****} For example, a remarkable example is an interpretation of the same Article of the North American Free Trade Agreement (NAFTA), when different tribunals, while considering the case, come to interpret and understand the Article differently. In the second scenario, different tribunals organized under different treaties can come to different conclusions about disputes involving the same facts, related parties, and

^{*****} Ylli Dautaj, *Between Backlash and the Re- Emerging “Calvo Doctrine”: Investor State Dispute Settlement in an Era of Socialism, Protectionism, and Nationalism*, Vol. 41, No. 3 Northwestern Journal of International Law & Business 276 (2021). See also, Thomas E. Carbonneau, *Commercial Peace and Political Competition in the Crosshairs of International Arbitration*, 18 DUKE J. COMP. & INT’L L. 311 (2008), but reprinted in THOMAS E. CARBONNEAU, *CARBONNEAU ON INTERNATIONAL ARBITRATION: COLLECTED ESSAYS* (2011).

^{†††††} Caron, D., Schill, S., Cohen Smutny, A., & Triantafyllou, E. (Eds.), *Practising Virtue: Inside International Arbitration*.: Oxford University Press. (2015).

^{†††††} Sungjoon Cho, Jürgen Kurtz, *Convergence and Divergence in International Economic Law and Politics*, in EUROPEAN JOURNAL OF INTERNATIONAL LAW, Volume 29, Issue 1, 169 (2018).

^{§§§§§} Schill, Conceptions, *supra* note 3, at 108.

^{*****} See, e.g., Schultz, *Against Consistency in Investment Arbitration*, in Z. Douglas, J. Pauwelyn and J.E. Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* 297 (2014).

^{†††††} See Mills, *Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration*, 14 Journal of International Economic Law (JIEL), 469 (2011).

^{*****} Ylli Dautaj & Crina Baltag, *Investors, States, and Arbitrators in the Crosshairs of International Investment Law and Environmental Protection*, in BRILL RESEARCH PERSPECTIVES (2020). See also, *Glamis Gold, Ltd. v. United States of America*. International Centre for Settlement of Investment Disputes [ICSID], June 8, 2009, at paras. 612, 616, 828-829, <https://www.italaw.com/sites/default/files/case-documents/ita0378.pdf> (last visited December 1, 2022); *Bilcon v. Canada* case (2015).

similar investment rights.^{§§§§§§} Thirdly, different tribunals under different investment treaties will consider disputes involving a similar commercial situation and similar investment rights but will come to opposite conclusions.^{*****}

Other criticism considers and justifies that investor's rights are over-protected compared with State's interests.^{†††††††} However, other scholars argue that the role of the State increased in recent years and its rights much higher and weightier investors.^{††††††} Another criticism directed against investment arbitration is the problem of uncertainty and unpredictability.^{§§§§§§}

The controversial nature of international investment arbitration largely stems from the fact that it deals with private and public law matters.^{*****} The latter triggers legitimacy-related arguments against investment arbitration. In general, the criticism asserts that investment treaties and investment-treaty arbitration institutionalize a pro-investor bias that casts the legitimacy of the entire system of international investment law and arbitration into doubt.

II. INVESTMENT TREATY ARBITRATION AWARDS

Arbitration rules in investment arbitration allow arbitral tribunals to decide on a subject through an award, a decision, or an order.^{†††††††} This part of the Article is covered by Articles 53, 54 and 55 of the ICSID Convention ("**Convention**"), which, amongst other terms, provides that an award rendered pursuant to the Convention shall be binding on the parties and that each party shall abide by and comply with the terms of the award, and Article 54 imposes an obligation on each Contracting State to recognize such an award and to enforce the pecuniary obligations imposed thereby and Article 55 reserves the law of that State on sovereign immunity from execution. Thus, the first provision is

^{§§§§§§} Pia Acconci, *Most-Favoured-Nation Treatment*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW (Christoph Schreuer et al. eds., 2008), at 367

^{*****} Nassib Ziadé, *Challenges and Prospects Facing the International Centre for Settlement of Investment Disputes*, in THE EVOLVING INTERNATIONAL INVESTMENT REGIME: EXPECTATIONS, REALITIES, OPTIONS (José Alvarez et al. eds., 2011), at 120-124.

^{†††††††} One example is the recent case of *Bear Creek v. Peru* (2017). *Bear Creek Mining Corporation V. Republic of Perú*. International Centre for Settlement of Investment Disputes [ICSID], ARB/14/21, Nov. 30, 2017, https://www.italaw.com/sites/default/files/case-documents/italaw_3036.pdf (last visited November 25, 2022).

^{††††††} Sergio Puig and Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, and Anthea Roberts, *Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration*.

^{§§§§§§} Tribunal could act in the most unpredictable way, while deciding of the case, which significantly influences on precedent law and fundamental principles of common law system. See generally August Reinisch, *The Future of Investment Arbitration*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER (Christina Binder et al. eds, 2009), at 904 ("It is an open secret that there are awards and decisions of highly variable quality" with some of them not fulfilling "...expectations of the users of the system...").

^{*****} See Joshua Simmons, *Valuation in Investor-State Arbitration: Toward A More Exact Science*, 30 Berkeley Journal of International Law 196 (2012), at 214.

^{†††††††} Binder, C., Kriebaum, U., Reinisch, A. and Wittich, S., *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, p. 970 (2009).

addressed to the parties, while the second and third are addressed to the State where recognition and enforcement is sought (the forum State). The three articles constitute Section 6 of Chapter IV of the Convention entitled “*Recognition and Enforcement of the Award.*”

Arbitration in its essence is based on the party autonomy. Consequently, when submitting their dispute to arbitration, the disputing parties appear to be prepared to accept that the arbitral tribunal might issue an erred decision on a point of fact or law, which is final in its nature, thereby preventing further appellate procedures. Although this seems to be a natural assumption and risk of arbitration, this cannot necessarily ensure a lawful, fair and just final award. Therefore, it is paramount not to frustrate the parties’ expectations and give a favorable consideration to potential judicial or non-judicial reviews of arbitral awards.

A. *Final and binding nature of investment arbitration awards*

The nature of final and binding awards in arbitration binds the parties not to appeal, which meets the certainty in settling disputes. To apply for the final and binding nature of investment arbitration awards, Article 53 (1) of the ICSID Convention provides that “*the award shall be binding on the parties*” and that “*Each party shall abide by and comply with the terms of the award* “. A priori, this Article originates from the most significant provision of international law identified in the Vienna Convention – “*pacta sunt servanda*”. Article 37 of the Hague Convention for the Pacific Settlement of International Disputes dated 1907 expresses the effect of *pacta sunt servanda* as follows: “Recourse to arbitration implies an engagement to submit in good faith to the award.”^{*****} The term ‘*final award*’ is customarily reserved for an award that completes the mission of the arbitral tribunal.^{§§§§§§§§} Simply said, a final award means that the parties may not appeal the arbitral award, even reviewed its validity by the court. Subject to certain exceptions, the delivery of a final award renders the arbitral tribunal *functus officio*: it ceases to have any further jurisdiction in respect of the dispute and the special relationship between the arbitral tribunal the parties during the currency of the arbitration ends.^{*****}

An inquiry into the “binding” nature of an award should refer only to the parties’ arbitration agreement^{††††††††}, terms of reference^{††††††††}, or the parties’ preconditions to the creation of an enforceable award. Binding means that once the arbitral award has been ruled, it binds the parties to respect and execute the award in good faith.

B. *Recognition and enforcement matters*

^{*****} For general reference see K. Carlston, *The Process of International Arbitration* (1946); J. Simpson and H. Fox, *International Arbitration* (1959); W. Reisman, *Nullity and Revision* (1971); G. Wetter, *The International Arbitration Process* (1979).

^{§§§§§§§§} Blackaby, Nigel, Constantine Partasides, and A. Redfern. *Redfern and Hunter on International Arbitration*. Oxford: Oxford University Press, (2009).

^{*****} See Gary Born, *International Commercial Arbitration* 2425 (2d ed. 2014).

^{††††††††} van den Berg, A., *New York Convention of 1958: Refusals of Enforcement*, ICC International Court of Arbitration Bulletin, Vol. 18, No. 2, p. 14. (2007).

^{*****} G. Aksen, *American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, Southwestern University Law Review, p. 11. (1971).

Although ICSID Convention covers recognition and enforcement of awards, it still needs academic research and remarks to account for the recent changes and amendments to these provisions, including 54 Article. The question is often raised whether the provisions of the Convention promote effective enforcement of ICSID arbitral awards. The effectiveness of international arbitration ultimately depends on whether the arbitral award can be enforced against the losing party.^{§§§§§§§§} Article 54(1) of the ICSID Convention provides that “*Each contracting State shall recognize an award rendered and enforce the pecuniary obligations imposed by the award within its territories as if it were a final judgement of a court in that State.*” From the first side, according to scholar Delaume^{*****} says, that

“Despite the fact that the procedure for recognition and enforcement of ICSID awards is made as simple and effective as possible, a holder of a recognized ICSID award has only an executory title, especially if the losing party is the state party to the dispute. While the award may readily be enforced against an investor or its assets, the situation may be different if enforcement is sought against the state party to the dispute.”

The primary reason for this disparity in enforcing an ICSID arbitral award is that the ICSID Convention does not alter or supersede the immunity rules from execution against a state that fails to comply with an ICSID award.^{††††††††} Therefore, the effectiveness of execution measures against a state depends upon the immunity rules^{††††††††} prevailing in the country in which execution is sought.^{§§§§§§§§}

Further, although it has little practical relevance, I need to determine the distinction between recognition and enforcement of decisions,^{*****} primarily because due to international enforcement mechanisms such as the ICSID Convention^{††††††††} or the New York Convention,^{††††††††} no separate recognition procedure (in the sense of a double *exequatur*) is required for enforcement. ICSID awards enjoy an exceptionally high level of enforceability. According to the ICSID Convention,

^{§§§§§§§§} Van den Berg, *Some Recent Problems in the Practice of Enforcement under the New York and ICSID Conventions*, 2 ICSID REV. 439 (1987), reprinted in BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW*, 389-394 (1995).

^{*****} George Delaume, *ICSID Arbitration*, in *CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION* 23-4 (1. LEw, ed. 1987).

^{††††††††} *Id.*

^{††††††††} Lauterpacht in his scholar paper ‘*The Problem of Jurisdictional Immunities of Foreign States*’ states that there is a difference between immunity from enforcement and immunity from execution. Justifications and examples are presented in *Liberian Eastern Timber Co. v. Government of Liberia* (Leteo v. Liberia) and *Soabi v. Senega* case. In latter case the Supreme Court reaffirmed as a matter of French law that “a foreign State which has consented to arbitration has thereby agreed that the award may be granted recognition, which does not constitute a measure of execution that might raise issues pertaining to the immunity of the state concerned.” To be precise, the distinction between immunity from jurisdiction and immunity from execution, that enforcement of an award against a state falls under immunity from jurisdiction, while immunity from execution comes into play when actual execution measures are sought.

^{§§§§§§§§} *Id.*

^{*****} Toope SJ, *Mixed international arbitration*. Cambridge University Press, Cambridge pp. 102 (1990), et seq.; however, an important distinction is, that a decision, indeed, can be accepted as *res judicata*, but, at the same time can be unenforceable e.g., due to state sovereignty.

^{††††††††} Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18.3.1965, 575 UNTS 159; 4 ILM 532 (1965).

^{††††††††} Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, 330 UNTS 38; 7 ILM 1046 (1968).

ICSID awards have to be recognized as binding, and their monetary content (namely compensation and damages) has to be enforced in a manner equivalent to a last-instance decision of its state courts by all (currently 1635) parties to the ICSID Convention.^{§§§§§§§§§§} This means that a review of whether the content of the specific ICSID award is in accordance with the *ordre public* or similar concepts has to be omitted. The only permissible restriction of enforceability is the law of state immunity in enforcement proceedings.

In practice, it often occurs that losing state parties do not comply with their obligations resulting from awards; in such cases, the prevailing party often has only a chance to successfully enforce the award if the assets of the losing party are located in a third state and can be accessed there via an enforcement procedure. Mostly, recognition and enforcement of investment arbitration award based on the investment treaties with no written *ex ante* arbitration agreement between the parties to the dispute. This is the primary difference with commercial arbitration based on the New York Convention.

C. Annulment procedure of investment treaty awards

I have established that international arbitration awards rendered by international arbitration tribunals are final and binding on the parties to the dispute. However, because of the ambiguity and human error – which can range from typographical errors to in-depth analysis of the legal issues in question – the finality of arbitral awards can be challenged by a number of instruments under international conventions and national laws.^{*****}

Under the ICSID Convention, annulment was designed to confer a limited scope of review of the award to safeguard from violations of fundamental principles of law in the proceedings and not as a recourse to review the substance of the award.^{††††††††††} Moreover, I find it highly relevant to analyze and consider caseloads^{††††††††††} in this part of the Article. In particular, from 2011 to 2020, 225 awards were rendered under the ICSID Convention, and 88 applications for annulment were submitted before ICSID. Out of those applications, 56 were rejected, 25 were discontinued, and only seven succeeded in the annulment of the award in part or in full. Only a few cases have been resubmitted to a new tribunal.

Article 52 of the ICSID Convention allows the parties to request the annulment of the award based on five exhaustive grounds, i.e., that:

- a) the tribunal was not properly constituted.^{§§§§§§§§§§} This ground refers to the improper constitution of the tribunal and includes questions concerning the constitution of the tribunal and the arbitrators, such as their nationality and possible conflicts of interest of one or more of the arbitrators.

^{§§§§§§§§§§} Smith, Jeanne M. Harisson, Currie, and Hancock LLP, *United States: Is Arbitration Final and Binding?*, Mondaq, Available at <http://www.mondaq.com/> (2018)

^{*****} F Li, 'The Divergence of Post-Award Remedies in ICSID and Non-ICSID Arbitration: A Perspective of Foreign Investors' Interests'. *The Chinese Journal of Comparative Law*, pp. 3–7. (2016)

^{††††††††††} ICSID Background Paper on Annulment (2016), para. 71.

^{††††††††††} *Awards Rendered and Outcomes in Annulment Proceedings under the ICSID Convention, by Decade.*^{*****}

^{§§§§§§§§§§} See *Mobil Cerro Negro Holding, Ltd., Mobil Cerro Negro, Ltd., Mobil Corporation, and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment, 9 March 2017, paras 180–184.

- b) the tribunal manifestly exceeded its powers. ICSID arbitral awards. ***** To warrant annulment, the excess of powers must be manifest; that is, it must be evident. The most common cases the manifest excess of powers has been alleged are that the tribunal lacked jurisdiction, the tribunal failed to exercise jurisdiction where it did have jurisdiction, the tribunal failed to apply proper law, or the tribunal applied the law erroneously.
- c) there was corruption on the part of a member of the tribunal. ++++++ Corruption refers to improper conduct by the arbitrator, which was induced by the personal gain from one of the parties or an interested third party and, as a consequence, is biased in favor of the said party.
- d) there was a severe departure from a fundamental rule of procedure. ++++++ This is another commonly used ground in the application for the annulment of ICSID awards. For an award to be annulled under this ground, there has to be a severe deviation that affects a fundamental rule of procedure and that not every departure from a rule of procedure merits annulment, or
- e) the award failed to state the reasons on which it was based. §§§§§§§§§§ The final ground for annulment under Article 52 of the ICSID Convention is that the award failed to state the reasons on which it is based. This ground is premised on the right of the parties to know and understand the reasoning that led the tribunal to its conclusions on fact and law.

In the context of the ICSID Convention, annulment is considered an exceptional remedy ***** that, in principle, does not affect the enforcement of the award and the parties' duty to comply with it.

III. GENESIS OF APPELLATE MECHANISM

Before examining this issue, it should be noted that existing legal framework provides for both judicial and non-judicial appellate mechanisms. Judicial review is primarily exercised in case of procedural appeals through the seat of arbitration, while the non-judicial review is active in case of challenges as to the award's form or content. Resolutive part of the award is never subject to appeal.

Furthermore, current international instruments significantly limit the potential of appellate mechanisms. It can be seen from the annulment process, which is deemed different from an appeal. This is apparent from Article 53, which provides that the award shall not be subject to any appeal or any other remedy except those provided for in the Convention. Moreover, it does not extend beyond the closed list of grounds to errors on the merits, i.e., errors of law or fact in the award. The result of a successful annulment procedure is the invalidation of the original decision; in contrast, an appeal may

***** See *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case ARB/81/2, Decision on Annulment, 3 May 1985, para. 79

+ + + + + CH Schreuer, L Malintoppi, A Reinisch, A Sinclair. *The ICSID Convention: A Commentary*, 2nd edn, Cambridge University Press (kindle edition)

+ + + + + *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, para. 58

§ § § § § § § § § § *Maritime International Nominees Establishment (MINE) v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on Annulment 22 December 1989, para. 5.09

***** *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Decision on Annulment, 19 October 2009, para. 24; '[A]nnulment is an exceptional, narrowly circumscribed remedy, and the role of an ad hoc committee is limited'.

modify the decision.^{††††††††††} The first and the most crucial advantage of investment disputes is non-reliance on standards of the host State and the domestic courts. The finality of arbitration proceedings and their binding nature has been seen as a primary benefit over the judicial settlement.

However, the Arbitral tribunal is composed of individuals, not machines, who sometimes risk making inconsistent awards or error awards. Therefore, at the early beginning of the XX century, legal scholars started a broad discussion on the possibility of appeal procedure for investment disputes.^{*****} Many countries have recently decided to develop an appeal mechanism for investment disputes and have inserted specific provisions regarding such a mechanism in their investment agreements. By mid-2005, several countries have signed treaties with provisions concerning an appeal mechanism.^{*****}

A. Recent amendments into post arbitral proceedings provisions in ICSID convention

In the United States, the US Trade Act of 2002, which granted trade promotion authority to the Executive Branch of the US Government and has been the basis for the conclusion of several recent US Free Trade Agreements, set down a number of objectives with respect to foreign investment. These included a negotiating objective of an appellate mechanism for investment disputes under free trade agreements: “... *providing for an appellate body or similar mechanism to provide coherence to the interpretations of investment provisions in trade agreements...*”. As a result of this Act, the following specific language on an appellate mechanism was inserted in the recent US Free Trade Agreements with Chile, Singapore and Morocco, and the 2004 US Model BIT.

During the last few years, among proposals to amend the ISDS system, the scholars also deliberated two systematic reforms: (i) the establishment of a multilateral investment court; and (ii) the creation of

†††††††††† See Caron D.D., *Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction between Annulment and Appeal*, 7 ICSID Review-FILJ 21 (1992).

***** See E. Lauterpacht, *Aspects of the Administration of International Justice* 1991. S. Schwebel "The Creation and Operation of an International Court of Arbitral Awards, in The Internationalisation of International Arbitration, Hunter, M., Mariott, A., Veeder, V.V. (eds.), 115 (1995).

See “*Suggested changes to the ICSID Rules and Regulations*”, p. 4, Working Paper of the ICSID Secretariat, May 12, 2005, www.worldbank.org/icsid/052405-sgmanual.pdf.

***** See B. Legum, *The Introduction of an Appellate Mechanism: the US Trade Act of 2002*, in ANNULMENT OF ICSID AWARDS, see op. cit., No. 3, pp. 289-313.

[illegible]

***** See B. Legum op. cit., No. 20; 19 USC, paragraph 3802(b)(3)(G)(iv).

§§§§§§§§§§§§§§§§ Annex 10-H. The US-Chile Free Trade Agreement was signed on June 6, 2003.

***** Letter exchange, US Trade Representative R. Zoellick to Singapore Minister of Trade and Industry, G. Yeo on May 6, 2003. The US-Singapore Free Trade Agreement was concluded on January 15, 2003.

[illegible]

***** Annex D. For the text of the 2004 US Model BIT, see www.state.gov/documents/organisation/38710.pdf. Annex D.

an appellate mechanism. While the first reform could be considered as a separate academic paper, this Article will mainly discuss the second reform in the recourse of recent news and initial drafts for appellate mechanism. This Part of the Article explores whether introducing an appellate mechanism in investment arbitration is likely to achieve greater consistency in investment law, as imagined by advocates for creating an appeals facility.

B. *Peculiarities of appellate mechanism and procedure in investment arbitration*

In the economic context and the field of investment, appeal procedures have been provided for, although they are not found as frequently as procedures on interpretation and revision. They have often been constituted to secure the uniformity of application and interpretation of the underlying law. §§§§§§§§§§§§§§§§§§§§ They thus come close to other types of review by a higher court, comparable to a supreme court function. They have narrower grounds for appeal, usually limited to issues of law. Some recent bilateral or regional investment treaties with proposed appellate mechanisms also provide that manifest errors of fact can be grounds for appeal. *****

1. *Grounds for appeal in the investment arbitration*

Working Group III suggests two possible appellate mechanisms to consider. The first option is limiting the instances of appeal to errors of law, “manifest” errors of fact, thereby according to some degree of deference to the findings of the first-tier tribunals, and mixed errors of law and fact. This standard of review of fact tends to be more deferential by placing more weight on the decision by the first-tier tribunal and thus could be limited to “manifest” errors. “Manifest” error is used by the appellate mechanism to determine whether an error of fact, such as dishonest testimony by a key witness, or the failure to take account of an important exhibit, influenced the outcome of the decision by the first-tier tribunal. †††††††††††††††††††† By considering this option, Working Group III understands that the first-tier tribunal has presided over the trial, heard the testimony, and has the best understanding of the evidence and therefore receives substantial deference.

The second option envisages the possibility of an appellate mechanism conducting a “*de novo*” review of both law and facts to consider other types of errors in exceptional circumstances. Under “*de novo*” review, the appellate court usually acts as if they were considering the question for the first time, affording no deference to the decisions of the first-tier tribunal. In such cases limiting re-litigation

§§§§§§§§§§§§§§§§§§§§ See, for instance: (1) WTO agreement: “An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.” The Appellate Body has no authority to examine new factual evidence or re-examine existing factual evidence upon which the panel report is based; even a manifest error of fact would not be reviewable by the Appellate Body; (2) Mercado Común del Sur (the “MERCOSUR”): “The appeal shall be limited to the questions of law dealt with in the dispute and to the legal interpretations developed in the award of the Ad Hoc Arbitral Tribunal.” (3) Court of Justice of the European Union: “An appeal to the Court of Justice shall be limited to points of law. It shall lie on the grounds of lack of competence of the General Court, a breach of procedure before it which adversely affects the interests of the appellant as well as the infringement of Union law by the General Court. No appeal shall lie regarding only the amount of the costs, or the party ordered to pay them.”

***** See, for instance: EU-Singapore Investment Protection Agreement: “The grounds for appeal are: (a) that the Tribunal has erred in the interpretation or application of the applicable law; (b) that the Tribunal has manifestly erred in the appreciation of the facts, including the appreciation of relevant domestic law; or, (c) those provided for in Article 52 of the ICSID Convention, in so far as they are not covered by (a) and (b).

†††††††††††††††††††† See, Working Group III (Investor-State Dispute Settlement Reform), *Possible reform of investor-State dispute settlement (ISDS) Appellate mechanism and enforcement issues*, Note by Secretariat (dated October 22, 2004)

might serve to reduce unnecessary costs and delays.⁺⁺⁺⁺⁺

2. Duration of proceedings

Arbitral proceedings in investment treaty arbitration are, in most cases, long in duration and could draw out for more than two years. Thus, the appellate mechanism should be considered in strict timelines to avoid additional delays and costs for the parties in dispute. Draft of UNCITRAL Working Group III considers identifying the exact timeline⁺⁺⁺⁺⁺ for the appellate process to avoid unnecessary delay in the resolution of disputes and correctness. In comparison with other analyzed time periods in appellate mechanisms^{*****}, I find that duration of appeal should be based on the complexity of the issue.

C. Advantages and disadvantages of an appellate mechanism

This Part of the Article will discuss benefits and possible adverse outcomes in case of appeal implementation in investment arbitration. To start with, I argue that there are just black and white lines in this issue. A priori, it is difficult to dissociate the rationale for appeal from the approach to be taken vis-à-vis the specific modalities of such an appeal mechanism.

As identified in Part I (B), the main problem of arbitration award while determining finality and binding nature of the award/decision, inconsistency and unpredictability of specific arbitration awards that are rendered. This is also a problematic matter in the legitimacy concept because different tribunals render and decide differently. Thus, consistency is considered one of the primary and sufficient advantages for creating an appellate mechanism advanced by its proponents. Nowadays, in investment arbitration, consistency and coherence create predictability and enhance the legitimacy of investment arbitration system⁺⁺⁺⁺⁺. Although there is no guarantee that the inconsistencies would have been avoided if these awards had been submitted subsequently to an appeal, the chances for consistency would be reinforced by the existence of a common appeals body because an appellate mechanism could provide a more uniform and coherent means for challenging awards if traditional

⁺⁺⁺⁺⁺ *Id.*

^{*****} Suggestions ranged from 90 days, 180 days, to a maximum of 300 days

^{*****} For instance, the International Criminal Court (ICC) does not specify any deadline for its Appeals Chamber to issue its decisions. Rule 156(4) of the Rules of Procedure and Evidence of the ICC states that the appeal shall be heard as expeditiously as possible. Based on the ICC website and the decisions of the Appeals Chamber, the time period between the filing of the appeal or grant of leave to appeal and the Appeals Chamber's decisions varied between 440 days and 796 days. Likewise, the statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) does not provide any timeline for the Appeals Chamber to render its decisions. A sample of cases shows that the time period between the judgement of the first instance and the Appeals Chamber's decisions ranged from 394 days to 828 days. However, Rule 116bis of the Rules of Procedure and Evidence provides for expedited appeals procedure, on the basis of the original record of the first instance and written briefs only, for specific decisions such as preliminary motions. In one example of such expedited procedure, the appeals decision was issued 23 days after the first instance decision (Case No.: IT-02-54-AR65.1, Appeals Chamber's Decision of 17 March 2006). Similar procedures can be found for the International Criminal Tribunal for Rwanda. Based on a review of some cases, the time periods between the original decision and the Appeals Chamber's decisions ranged from 375 days to 1,004 days. In comparison, studies on ICSID annulment procedures report durations of 639 days or 730 days between the registration of the annulment request and the decision of the ad hoc committee.

⁺⁺⁺⁺⁺ The inconsistent decisions based on the same or similar facts rendered for instance in the *CME v. Czech Republic* and *Lauder v Czech Republic* cases have attracted widespread attention.

bases for annulment were incorporated. It became the exclusive means to challenge an award.

ICSID Convention employs the distinctive feature, making it attractive in line with conflict of law issues. Most other international adjudication instruments do not cover enforcement but leave the issue to domestic laws or applicable treaties.***** Therefore, other advantages of the appellate body might enhance the expeditious and effective enforcement.

The State always possesses some influence at national and quasi-national levels. It deprives the investor of his right to equal proceedings in case of one party's breach (mostly in case of State's breach). Although arbitration requires and provides "*the equality of arms*" principle, immunity of State usually complicates the arbitral procedure in the general sense. While arbitral awards may not be appealed on the merits under the current arbitration system, the system reserves a limited but fundamental role for national courts to review non-ICSID awards.***** For this purpose, the appellate mechanism would uphold the principal advantage of investor-state dispute settlement: the review of investment awards, in particular those outside the ICSID system, i.e. under UNCITRAL and the ICSID Additional Facility Rules, would be confined to neutral and qualified tribunals which would operate on the basis of international standards and procedures instead of taking place in domestic courts which may have a local bias or be subject to governmental influences.

As to the negative outcome of the appeal, mechanism implementation is ICSID Convention should have been redrafted because it would contravene with the principle of finality, would bring additional delays, costs, and caseload lead to the politicization of the system. As I expanded in Part I of this Article, finality means the end of the procedure and closes the settlement process. To the extent the appeal mechanism expands the grounds currently available for annulment or set aside of an award, it would compromise the finality of arbitration. However, because investment arbitration involves public interest matters, the risk of flawed or erroneous decisions makes the appeal less problematic than it may be in traditional commercial arbitration. Moreover, the appellate mechanism could express additional delays and costs, which is not favourable for the parties. The additional delays and time periods could limit the problem by setting specific time limits in the appellate process. Also, if the tribunal had set up a clear and precise list of questions, it would be less costly. Since investment arbitration has been established as one of the most de-politicized dispute resolution mechanisms, scholars find that this feature could be undermined. There was a view that governments, to please their constituencies, are likely to appeal on every case they lose in the first instance, and they would be the primary beneficiaries of the system. In addition, it was argued that if the choice of appellate arbitrators is made by the states only, there is a risk of bias against investors.***** I argue with this point because investors have the same rights and could appeal in the same way as governments do. Moreover, I consider that the posting of a bond would provide security for the investor of the amount of the award rendered, which, as noted, can be of particular significance for non-ICSID arbitration.

***** See, H.J. Abs, *Proposals for Improving the Protection of Private Foreign Investments*, in INSTITUTE INTERNATIONAL D'ÉTUDES BANCAIRES, Rotterdam, as cited by A. Sinclair op. cit., No. 108, (1958).

***** See, Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals*, Oxford University Press, International Court and Tribunal Series, (2003).

***** Hans Christiansen, Ayse Bertrand, *International Investment Perspectives*, OECD, ISBN 92-64-02689-4, (2006) Online Source: <https://www.oecd.org/daf/inv/investmentstatisticsandanalysis/37010986.pdf> (Accessed on December 12, 2022).

To this point, I conclude that although there is a number of essential disadvantages at hand, all of them could be eliminated provided that the proper implementation has been introduced.

IV. CONCLUSION

Undoubtedly, the ICSID Convention tends to go in tune with the times and changes in international treaties vice versa, as well as global community requirements. Despite its effectiveness, the ICSID Convention only goes halfway in realizing its objectives. The problem of enforcement still haunts the ICSID mechanism. Thus, the appellate mechanism in investment arbitration partially considers practical post-award matters. Moreover, the appellate mechanism could provide consistency and possible predictability of the arbitration awards. However, it is still the question to what extent and whether appellate mechanism could contradict the primary purpose of arbitration – finality and binding nature of the award?